24TH FEDERAL LITIGATION COURSE

Evidentiary Objections

I. OBJECTIONS: BASIC REQUIREMENTS.

A. A timely objection is required. Rule 103, Federal Rules of Evidence (FRE).

1. The objection must be made as soon as the grounds reasonably appear. Errors in admitting evidence at trial are usually waived on appeal unless a proper, timely objection was made during the trial. FRE 103.

2. Once the court makes a definite ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error an appeal. 2000 Amendment to FRE 103(a).

3. At depositions, objections to the form of the questions or answers, are waived unless timely made at the deposition. Fed. R. Civ. P. 32. Other evidentiary objections (competency, relevancy, materiality, etc.) are not waived at deposition. Fed. R. Civ. P. 32.

B. If the objection is to the form of a question, the objection should be made before the answer is given, if practicable.

C. If the objection is to the answer, a motion to strike the answer should accompany the objection.

D. The grounds (legal basis) for the objection should always be stated, as succinctly as possible. FRE 103. For example, "Objection. Hearsay." Or, "Objection, calls for speculation."

E. "Speaking" objections, or objections that include excessive argument, are improper in the presence of the jury. FRE 103(c). If further argument is needed, counsel should request to approach at side-bar. "Speaking" objections are improper at deposition if the objection is designed to coach the witness or otherwise impede the orderly conduct of the deposition.

F. While it is unethical to make an unfounded objection solely to disrupt your opponent, it is proper to make an objection whenever there is a legitimate evidentiary basis for it.

G. However, it is usually unwise to object to every objectionable question or answer.

II. OBJECTIONS TO THE FORM OF THE QUESTION (OR ANSWER).[1]

A. **Leading** (on direct examination). FRE 611(c).

1. A "leading question" is one which suggests or contains its own answer.

2. Objectionable on direct examination. Permitted on cross-examination or when questioning a hostile witness. See FRE 611.

3. Allowed if preliminary, foundational, directing the witness's attention or refreshing the witness's recollection.

B. **Compound**. FRE 611 (a).

1. A "compound question" contains two separate inquiries that are not susceptible to a single answer.

2. Dual inquiries are permissible if the question seeks to establish a relationship between two facts or events. For example, "Did he roll forward and then put on his blinking lights?"

C. **Vague/Ambiguous**. FRE 611(a).

1. A "vague question" is incomprehensible, incomplete, or calls for an ambiguous answer. For example, the question, "Were you on duty?" is vague, since it does not specify a time period.

2. Unless the precise wording is important, it is often desirable to simply rephrase when your opponent objects to a vague question.

[1] Adapted from Steven Lubert, Modern Trial Advocacy: Analysis and Practice, Chapter 7 (NITA, 1993).

D. **Argumentative**. FRE 611(a).

1. An "argumentative question" asks the witness to accept the examiner's summary, inference or conclusion, rather than to agree or disagree with the existence (or non-existence) of a fact. Alternatively, an "argumentative" objection may be made when the examiner is excessively quibbling with the witness.

2. In response to an "argumentative" objection, the examiner may want to explain the question's relevance, or the non-argumentative point the examiner is trying to make.

E. **Narrative**. FRE 611(a).

1. A "narrative question" is one which calls for a narrative answer.

2. A "narrative answer" is one which proceeds at some length in the absence of questions.

3. Objections can be made to both narrative questions and narrative answers.

4. Expert witnesses are often allowed to testify in a narrative fashion. However, it is usually more persuasive to interject questions to break up lengthy answers.

F. **Asked and Answered**. FRE 611(a).

1. Once an inquiry has been "asked and answered" further inquiry is objectionable. Variation on a theme is permissible, so long as the identical information is not endlessly repeated.

2. The "asked and answered" rule does not preclude inquiring on cross examination into subjects that were covered fully on direct. Nor does it prevent asking identical questions of different witnesses.

G. **Assumes Facts Not in Evidence**. FRE 611(a).

1. A question, usually on cross examination, is objectionable if it includes as a predicate a statement of fact that has not been proven. Such questions include an unproved assumption. For example, the question "Isn't it true that you left your home so late you only had fifteen minutes to get to your office?" may be objectionable if the time of the witness's departure was not previously established. The witness cannot answer yes to the main question (15 minutes to get to the office) without implicitly conceding the unproved predicate.

2. Simple, one part cross examination questions do not need to be based on facts that are already in evidence. For example, it would be proper to ask a witness, "Didn't you leave home late that morning?," whether or not there had already been evidence as to the time of the witness's departure.

H. **Non-responsive Answers**. FRE 611(a).

1. The objection is especially applicable to a voluntary response by a hostile witness.

2. Some judges take the view that only the attorney asking the question can object to a "non-responsive" answer.

3. The modern view is that opposing counsel can object if all, or some part, of a witness's answer is non-responsive, even when the objecting counsel is not the examiner, because counsel is entitled to insist that the examination proceed in question and answer format, to allow for appropriate objections to inadmissible evidence.

I. **Misquoting Witness (or Misstating Evidence)**. FRE 611(a).

1. Counsel's question misstates prior testimony of witness or misstates prior evidence.

2. Similar to objection based on assuming a fact not in evidence.

J. **Counsel Testifying**. FRE 602, 603. Opposing counsel is making a statement instead of asking a question.

K. **Beyond the Scope (of Direct Examination, Cross Examination, etc.)**. Question is unrelated to preceding examination by opposing counsel. Remember, credibility is always "within the scope."

L. **Speculation**. FRE 602, 701.

1. A question which calls for conjecture, speculation or judgment of veracity is objectionable under Rules 602 (personal knowledge required) and 701 (lay witness opinion limited to opinions based on perception and helpful to understanding, such as distance, speed, intoxication, etc.).

2. This is technically a "substantive objection," but some may also consider it a "form" objection, which may be waived if not made at a deposition. See Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 147 n.8 (D.Md. 1997).

M. **Opinion**. FRE 701, 702.

1. A question is objectionable if it calls for an opinion by a witness not qualified to give one.

2. Lay witness opinion testimony may not be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." 2000 Amendment to FRE 701.

3. This is technically a "substantive objection," going to the competency of the witness, but some may also consider it a "form" objection, which may be waived if not made at a deposition. See Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 147 n.8 (D.Md. 1997).

III. SUBSTANTIVE OBJECTIONS.[2]

A. **Hearsay**. FRE 801-804.

1. "Hearsay" is a statement, other than by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c). Thus, any out-of-court statement, including the witness's own previous statement, is potentially hearsay.

2. Non-hearsay. FRE 801.

   a. A statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted. FRE 801(c).

   b. The witness's own previous statement is not hearsay if (1) it was given under oath at a trial, hearing or other proceeding, or at a deposition, and is inconsistent with the witness's trial testimony; or (2) it is consistent with the current testimony and is offered to rebut a charge of recent fabrication; or (3) is a statement of past identification. FRE 801(d)(1).

   c. Admission by a party-opponent. Must be offered against a party. FRE 801(d)(2).

3. Common hearsay exceptions (availability of declarant immaterial). FRE 803.

   a. Present sense impression. Statement describing an event while the person was observing it.

   b. Excited utterance. Statement relating to a startling event, while under the stress of excitement caused by the event.

   c. State of mind. A statement of the declarant's mental state or condition.

   d. Past recollection recorded. Memorandum or record about which the witness once had knowledge, but which she has since forgotten. The record must have been made when the events were fresh in the witness's mind and must have been accurate when made.

[2] Adapted from Steven Lubert, Modern Trial Advocacy: Analysis and Practice, Chapter 7 (NITA, 1993).

e. Business records. Records of regularly conducted business activity – made at or near the time of the transaction, by a person with knowledge, or transmitted from a person with knowledge. The foundation for the record must be laid by the custodian of the record, by some other qualified witness, or by Rule 902(11) or (12) or other statutory certification.

The 2000 Amendment to FRE 902 sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, through use of an affidavit or declaration. Advance written notice of intent to offer a record into evidence under Rule 902 is required.

f. Reputation as to character. Evidence of a person's reputation for truth and veracity. (Note there are restrictions other than hearsay on the admissibility of character evidence.)

4. Common hearsay exceptions (declarant must be unavailable). FRE 804.

a. Dying declaration. A statement by a dying person as to the cause or circumstances of what he or she believed to be impending death.

b. Statement against interest. A statement contrary to the declarant's pecuniary, proprietary, or penal interest at the time of making.

c. Former testimony. Testimony given at a different proceeding, or in a deposition, if the testimony was given under oath and the adverse party had an opportunity to cross examine the witness.

B. **Irrelevant**. FRE 402. Would not tend to make any fact that is of consequence more probable or less probable. Motion to strike may be appropriate.

C. **Unfair Prejudice**. FRE 403. The probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

D. **Improper Character Evidence**.

1. Character evidence is generally not admissible to prove that a person acted in conformity with his or her character. May be offered to show motive, opportunity, intent, plan, knowledge, identity, absence of mistake, etc. FRE 404.

2. The credibility of a witness who takes the stand and testifies may be impeached on the basis of a prior criminal conviction, but only if the crime was a felony or one which involved dishonesty or false statement. With certain exceptions, the conviction must have occurred within the last ten years. FRE 609.

3. A witness may be cross-examined concerning prior bad acts only if they reflect upon truthfulness or untruthfulness. Extrinsic evidence of such bad acts is not admissible. The Rule was amended in 2003 to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attach or support the witness' character for truthfulness, and does exclude extrinsic evidence offered for other grounds of impeachment. FRE 608.

4. Reputation evidence is admissible only with regard to an individual's character for truthfulness or untruthfulness. Evidence of truthful character is admissible only after the character of a witness has been attacked. FRE 608.

E. **Lack of Personal Knowledge**. FRE 602. A witness may not testify unless personal knowledge shown (with the exception of experts).

F. **Improper Opinion**. FRE 701, 702.

1. Lay witnesses are generally precluded from testifying as to opinions, conclusions, or inferences. FRE 701.

2. Expert witnesses must be qualified by knowledge, skill, experience, training, or education to offer opinion testimony. FRE 702.

G. **Speculation**. See above.

H. **Authentication Lacking**. FRE 901(a). Proof must be offered that the exhibit is in fact what it is claimed to be.

I. **Best Evidence Rule**. FRE 1002. If it applies, original document must be offered or its absence accounted for. If the contents of a document are to be proved, the rule usually applies.

J. **Foundation Lacking**. FRE 602; 901(a). Nearly all evidence, other than a witness's direct observation of events, requires some sort of predicate foundation for admissibility. This objection is appropriately interposed if there is a lack of authentication for the proffered evidence, or if the proponent has failed to lay the proper predicate for the testimony or exhibit.

K. **Privileged**. FRE 501. Answer would violate a valid privilege.

L. **"Calls for Inadmissible Evidence" (Liability Insurance)**. FRE 411. Evidence that a person carried liability insurance is not admissible on the issue of negligence.

M. **"Calls for Inadmissible Evidence" (Subsequent Remedial Measures)**. FRE 405. Evidence of subsequent repair or other remedial measures is not admissible to prove negligence or other culpable conduct.

N. **"Calls for Inadmissible Evidence" (Settlement Offers)**. FRE 408. Offers of compromise or settlement are not admissible to prove or disprove liability. Statements made during settlement negotiations are also inadmissible.

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